

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Implementation of the Pay Telephone
Reclassification and Compensation
Provisions of the Telecommunications
Act of 1996

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CC Docket No. 96-128

File No. NSD-L-99-34

**COMMENTS OF THE
AMERICAN PUBLIC COMMUNICATIONS COUNCIL
ON FURTHER NOTICE OF PROPOSED RULEMAKING**

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SUMMARY

As a means to “ensure that payphone service providers are fairly compensated for each and every . . . call,” the FCC’s current rules, which require a relatively concentrated group of facilities-based interexchange carriers (“IXCs”) to pay for reseller calls, are far superior to its “old rules,” which required hundreds of payphone service providers (“PSPs”) to chase hundreds of resellers. In fact, the “old rules” frustrated the federal statutory scheme, depriving PSPs of fair compensation for “each and every . . . call.” Requiring the first facilities-based carrier to compensate PSPs for all the calls they carry, including calls completed by switch-based resellers, is not only sound policy, but also is necessary in order to comply with the statutory mandate of Section 276.

The core problem here – the extreme difficulties and burdens encountered by PSPs in trying to collect the full amount of dial-around compensation from resellers – is an extreme version of a problem that is inherent in the nature of the payphone compensation system. The PSP has no leverage in its relationship with the IXCs, it is an unwilling supplier to a willing taker who is an unwilling payer, who can’t be cut off, and who, in the case of switch-based resellers, is invisible to the PSP. And the PSPs have no recourse to correct withheld or inadequate payments, other than litigation.

As a result of these peculiar conditions, the difficulties encountered by PSPs in collecting dial-around compensation from IXCs are so different from and so much greater than in an ordinary commercial relationship that extraordinary measures are required.

The major collection problems inherent in the dial-around compensation system are multiplied many times over if the pool of carriers from whom PSPs must collect compensation is expanded to include switched-based resellers. Not only are there

many more payers for PSPs to cope with, but the switch-based resellers, as a group, have proven themselves to be unusually reluctant and non-compliant payers. And they are generally ill-equipped to track payphone calls and manage payments to PSPs, compared to facilities-based IXC.

Under the “old rules,” PSPs had to collect compensation from hundreds of “switch-based” resellers with low public profiles and minimal, if any, involvement with the telecommunications regulatory system. Unlike the facilities-based IXCs with whom those resellers contracted for service, PSPs had and continue to have virtually no information about switch-based resellers or the calls routed to them. IXCs generally provided little or no information to PSPs about calls routed to resellers. Even where a PSP maintained its own call records, these records were of limited use in identifying resellers, especially in the absence of information matching reseller identities with toll-free numbers called.

Even when resellers could be identified, it proved to be extremely difficult and often prohibitively expensive to collect from switch-based resellers. First, PSPs have no leverage over resellers. Like the large facilities-based IXCs, resellers had little reason to pay compensation voluntarily. Most had to be repeatedly contacted and threatened with litigation – or in some cases, prosecuted – before they would begin to pay compensation. Even those resellers who did begin to pay compensation often failed to make regular quarterly payments.

Second, given the low profile, the small amount owed, and the low budget of the average reseller, the collection process was very costly and the payoff was usually small in comparison with the costs incurred. The dispersal of compensation obligations among hundreds of switch-based resellers, most of whom were individually too small

to be economical targets of PSPs' collection efforts, *guaranteed* that a large percentage of the total compensation owed would fall through the cracks of the compensation system, thereby *ensuring* that PSPs would be *uncompensated* for "each and every . . . call" (47 U.S.C. § 276(b)(1)(A)) routed to those resellers. By contrast with the old rule, the current rule appropriately relieves PSPs from the inordinate burden of collecting compensation from resellers, and places compensation responsibility on the party best situated to handle it – the facilities-based IXC. The facilities-based IXCs already have extensive systems for tracking and paying for compensable calls, and for recovering the costs of those calls by applying payphone surcharges to customers. The number of IXCs that must collect compensation from resellers is far less and far more concentrated than the number of PSPs that must do so. Unlike PSPs, IXCs have existing contractual service relationships with the resellers from whom they collect compensation. This gives IXCs leverage over resellers that PSPs entirely lack. If resellers do not pay their bills, the IXC is not required to continue serving the PSP.

IXCs have far more information about their reseller customers than do PSPs. IXCs already know exactly who their reseller customers are, and therefore know to whom to send the compensation bill for any given call. Furthermore, because resellers are their customers, IXCs' billing systems must collect information about resellers use of IXCs' networks as part of their normal billing mechanism.

There can be little question that the amendments made in the *Second Reconsideration Order* have improved overall collections of dial-around compensation for the payphone industry. Although it is not easy to isolate changes due to the *Second Reconsideration Order* from other compensation trends, even the most conservative assumptions lead to the conclusion that compensation for switch-based reseller calls has

increased by a minimum of 50-100% over the pre-November . Equally important, the cost of collections has declined dramatically. PSPs no longer need to deal with resellers – and thereby are saving the very substantial cost of collection activity and litigation against resellers.

It remains critical to ensure provision to PSPs of complete information about the volumes of calls routed to facilities-based IXC's and especially resellers. The PSP's ability to effectively audit or review the payments it receives from carriers is inherently very limited. In order to ensure that adequate information is available to PSPs to audit the compensation payments they receive from IXC's, the call reporting requirement should be retained and strengthened in two respects.

First, IXC's must provide reseller names and addresses for each toll-free number belonging to a reseller. PSPs need to know which resellers are associated with which toll-free numbers, so that they can identify resellers who may be underreporting completed calls. Second, the current rule does not require IXC's to provide any detail on call attempts – only completed calls. As a result, most PSPs are not able to assess the accuracy of the IXC's completed call counts. This is, again, particularly important for reseller calls, for which the IXC is relying on information from its resellers concerning call completion.

The burden of complying with existing requirements and these relatively minor modifications will not be great. Carriers have already had to make the necessary investment in the data systems necessary to comply with the current reporting requirements. Moreover, the bulk of the information that IXC's would have to provide is the very information that carriers must collect in order to accurately compensate PSPs.

The Commission did not explicitly address whether an IXC may use a reasonable proxy for completed calls, but has now asked for comment on that issue. *FNPRM* at ¶ 20. At present, IXCs must rely on call completion information from resellers. The IXCs claim it is burdensome to gather this data and that it complicates their relationship with their reseller customers. Further, the accuracy of the information is difficult to verify, leading to general concerns about its reliability and whether it is leaving the IXCs with exposure.

The Commission can ameliorate these concerns by allowing an IXC to establish proxies, based on *its own* actual call completion percentages, that enable the IXC to pay PSPs for a percentage of the calls terminated to reseller switches. Such a practice need not create any risk that PSPs will be overcompensated, or that SBRs will be disadvantaged.

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**COMMENTS OF THE
AMERICAN PUBLIC COMMUNICATIONS COUNCIL
ON FURTHER NOTICE OF PROPOSED RULEMAKING**

The American Public Communications Council ("APCC") hereby submits comments on the Commission's Further Notice of Proposed Rulemaking in the above-captioned docket. *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Further Notice of Proposed Rulemaking, FCC 03-119 (rel. May 28, 2003) ("FNPRM").¹ The Commission requests comment on whether to reinstate its rule providing that the first facilities-based interexchange carrier ("IXC") to which a call is routed has the obligation to pay dial-around compensation for all the payphone calls it carries including those terminated to the switch of a switch-based reseller.

¹ See also *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Second Order on Reconsideration, 16 FCC Rcd 8098 (2001) ("*Second Reconsideration Order*"), remanded sub nom., *Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2003).

I. THE COMMISSION SHOULD READOPT ITS RULES REQUIRING THE FIRST FACILITIES-BASED CARRIER TO COMPENSATE PSPs FOR CALLS ROUTED TO RESELLERS

As a means to “ensure that payphone service providers are fairly compensated for each and every . . . call,” the FCC’s current rules, which require a relatively concentrated group of facilities-based IXC’s to pay for reseller calls, are far superior to its “old rules,” which required hundreds of PSPs to chase hundreds of resellers. In fact, the “old rules” frustrated the federal statutory scheme, depriving PSPs of fair compensation for “each and every . . . call.” Requiring the first facilities-based carrier to compensate payphone providers for all the calls they carry, including calls completed by switch-based resellers, is not only sound policy, but also is necessary in order to comply with the statutory mandate of Section 276.

A. The Problems Experienced Collecting from Resellers Are Extreme Versions of Problems That Are Inherent in the Nature of the Payphone Compensation System

In addressing the question of who tracks and pays for payphone calls routed to resellers, it is critical to recognize that the core problem here – the extreme difficulties and burdens encountered by PSPs in trying to collect the full amount of dial-around compensation from resellers – is an extreme version of a problem that is inherent in the nature of the payphone compensation system. The PSP has no leverage in its relationship with the IXC’s, it is an unwilling supplier to a willing taker who is an unwilling payer, who can’t be cut off, and who, in the case of switch-based resellers, is invisible to the PSP.

1. Major Collection Problems Are Inherent in the Dial-Around Compensation System

The system of dial-around compensation for the use of payphones is unique in the telecommunications industry – or perhaps any industry.

First, the seller – the PSP – does not decide whether or when to provide service to the buyer – the IXC. In fact, the Commission has repeatedly stated that PSPs are prohibited by statute from “blocking” payphone users’ access to their preferred carrier. 47 U.S.C. § 226(c)).

Second, the PSP does not set the amount and terms of payment for dial-around access to its payphones – these are established solely by regulation.

Third, unlike virtually all other payment relationships, the customer (the carrier) bills itself, based on the customer’s own count of the quantity of service (*i.e.*, the number of calls) consumed. 47 CFR § 64.1310(a), with no duty to verify the count to the PSP-supplier.

Fourth, the customer is often invisible to the supplier. Although the PSP-supplier must make its services available, the PSP often does not even know who the carrier–customer is.

Fifth, even though the PSP–supplier may disagree with the customer’s self-determined call count (when the PSP can find out who the customer is), the PSP-supplier is not free to cut off service; therefore, the IXC-customer has no economic incentive to bargain over disputed payment issues. The PSPs’ only choices, when push comes to shove, are to back off and accept the proffered payment, or to litigate.

As a result of these peculiar conditions, the difficulties encountered by PSPs in collecting dial-around compensation from IXCs are so different from and so much greater than in an ordinary commercial relationship that extraordinary measures are

required. As willing takers but unwilling payers for a service they know cannot be cut off, the IXC's can be counted on to take advantage of any opportunity to withhold payments, and to resist any efforts by PSPs to dispute the amount of the payment. And the unwilling suppliers – the PSPs – have no recourse to correct withheld or inadequate payments, other than litigation.

2. The Inherent Collection Problems Are Greatly Multiplied If PSPs Are Required to Collect Compensation from Switch-Based Resellers

The major collection problems inherent in the dial-around compensation system are multiplied many times over if the pool of carriers from whom PSPs must collect compensation is expanded to include switched-based resellers. Not only are there many more payers for PSPs to cope with, but the switch-based resellers, as a group, have proven themselves to be unusually reluctant and non-compliant payers. They are generally ill-equipped to track calls and manage payments, compared to facilities-based IXC's. Moreover, due to the ease of entry and exit within the reseller industry, many resellers do not remain in the business long enough to become integrated into the dial-around system. Further, apart from the central fact that they are generally invisible to PSPs, the reseller industry by its nature generates byzantine business arrangements among facilities-based, switch-based and “switchless” resellers, in which it is especially difficult for outsiders, such as PSPs, who generally have no business relationships with their dial-around “customers,” to determine which resellers are switch-based and which are not, or who is the actual switch-based reseller and who is a service bureau that merely provides a “platform” for switch-based and/or switchless resellers. *See generally* Exhibit 1, “Prepaid/Debit Card Providers.”

B. Prior to November 23, 2001, PSPs Received a Small Fraction of the Compensation Due for Calls Involving Switch-Based Resellers

The Commission requests comment on whether, prior to the *Second Order on Reconsideration*, PSPs received full per-call compensation for calls that involved switch-based resellers. *FNPRM*, ¶ 18. The record is clear that they did not. As the Commission points out in the *FNPRM*, no party challenged the Commission's finding in the *Second Order on Reconsideration* that the old rule had "'not had the intended effect of ensuring that PSPs receive compensation for each and every completed, coinless payphone call.'"²

Under the "old rules," PSPs had to collect compensation from hundreds of "switch-based" resellers with low public profiles and minimal, if any, involvement with the telecommunications regulatory system. Few of these resellers stepped forward voluntarily to implement their tracking and payment obligations. Most had to be repeatedly contacted and threatened with litigation – or in some cases, prosecuted – before they would begin to pay compensation. Even those resellers who did begin to pay compensation often failed to make regular quarterly payments.

1. The Information Deficit

Unlike the facilities-based IXC's with whom those resellers contracted for service, PSPs had and continue to have virtually no information about switch-based resellers or

² *FNPRM*, ¶ 13, quoting *Second Order on Reconsideration*, ¶ 10. In the court review of the *Second Order on Reconsideration* the challenging IXC's conceded that "The record shows that . . . PSPs have had trouble collecting from SBRs [switch-based resellers]." Brief filed for Sprint Corp. et al., No. 01-1266 (D.C. Circuit, Mar. 11, 2002) at 42. Their challenge was based on the ground that the Commission had afforded insufficient opportunities under the Administrative Procedure Act to comment on the burdens they faced under the current rule.

the calls routed to them. IXC generally provided little or no information to PSPs about calls routed to resellers. They did not identify the number of calls for which the IXC was not paying because the calls were routed to “switch-based resellers,” and the IXCs resisted even identifying the resellers involved. Comments of the American Public Communications Council to the FCC, filed May 17, 1999, at 3-4 (“APCC 1999 Comments”); *see also* Declaration of Ruth Jaeger, attached as Exhibit 2, ¶ 9 (“Jaeger Dec.”).

To make matters worse, the IXCs often classified customers as resellers without making an actual inquiry to the customer, and sometimes withheld payment from the PSP even while continuing to collect a compensation “pass-through” charge from the customer. Comments of the American Public Communications Council to the FCC, filed May 17, 1999, at 3-4 (“APCC 1999 Comments”); *see also* Jaeger Dec., ¶ 9. In these instances, the reseller itself did not even know it was responsible for paying compensation. Of course, the IXC need not worry about whether a reseller is switch-based or not; if the reseller does not pay for the service it orders, the service is cut off.

Even where a PSP maintained its own call records, these records were of limited use in identifying resellers, especially in the absence of information matching reseller identities with toll-free numbers called. The attached declaration of Arthur Cooper describes the experience of one unusually skilled and resourceful PSP in trying to determine exactly which resellers were using his payphones and how much they owed. He could do so only by finding a way of gaining access (ordinarily restricted) to the database of “RESPORGs” for toll-free numbers, identifying the RESPORG for each toll-free number, and contacting each RESPORG to determine if it either was itself a switch-based reseller or would identify the switch-based resellers, if any, that it served. *See*

Declaration of Arthur Cooper, attached as Exhibit 3, ¶ 4 (“Cooper Dec.”). For most PSPs, it is not practical either to maintain their own calling records³ or to access the RESPORG.⁴

Therefore, even when a reseller responds to demands for payment, PSPs usually had no alternative but to trust the data supplied by the reseller, even though resellers had every incentive to fail to provide accurate call counts. For example, when the new rule was about to take effect, a reseller contacted APCC Services and sought to enter a direct payment relationship. The reseller claimed it had been fully compensating APCC Services since January 2000. Records showed, however, that the reseller had paid a total of \$550.00 to the more than 1,000 PSPs represented by APCC Services over the prior seven quarters. Suspicious, APCC Services pressed for confirmation, and finally got the reseller to acknowledge a liability for the period of about \$50,000 – almost 100 times the original payment. The data supplied by the reseller to support this newly discovery obligation was still inadequate, but APCC Services ultimately recognized it had no means to prove or disprove the amount. Jaeger Dec., ¶¶ 22-24.

³ Not all payphones provide the requisite call detail for determining the volume of calls to various numbers. Those payphones that do provide call detail often lack sufficient memory to maintain complete calling records long enough to be downloaded for central processing.

⁴ Nor does finding a RESPORG necessarily lead to the switch-based reseller responsible for a call. Some RESPORGs are service bureaus for their IXC customers. In APCC Services’ experience, some of these RESPORGs refuse to divulge information identifying their carrier customers.

2. Costs and Burdens of Collection

The information deficit, however, was only one part of the problem. Even when resellers could be identified, it proved to be extremely difficult and often prohibitively expensive to collect from switch-based resellers. There are several reasons for this.

First, PSPs have no leverage over resellers. Like the large facilities-based IXC, resellers had little reason to pay compensation voluntarily. As noted above, the Commission has stated that there is a statutory prohibition against PSPs “blocking” dial-around calls made to call-processing platforms, including reseller platforms. IXC of course can cut off services to non-paying customers, including resellers. And, unlike the large IXC, resellers generally have a low profile and are often invisible to the PSP; they often could avoid paying their compensation obligations for long periods of time without incurring litigation by PSPs. Jaeger Dec., ¶ 11.

Second, given the low profile, the small amount owed, and the low budget of the average reseller, the PSP seeking to collect from a reseller is required to perform numerous costly and burdensome tasks that are avoided or simplified when a PSP seeks to collect from a facilities-based carrier and which are far less burdensome when performed by an IXC, who already has a business relationship with its reseller customers. Initially, as discussed above, the reseller must be identified, and a means of contact established; this task alone may require hours of research. Next, the PSPs must make at least an educated guess at the reseller’s average volume of payphone calls, a fact known to the IXC, in order to determine whether the reseller is worth pursuing. Under the old rule this was a very inefficient and unscientific process for PSPs. Jaeger Dec., ¶ 12.

After identifying target resellers, it was almost always necessary to make repeated demands for payment, with escalating levels of threat, in order to have any

chance of inducing payment. Not only did the reseller lack any incentive to pay voluntarily, but the reseller was typically not adequately staffed to handle tracking and payment responsibilities. Jaeger Dec., ¶ 13. On the other hand, IXCs can simply terminate service to non-paying resellers, so resellers *are* motivated to pay their IXC suppliers. Of necessity, resellers have to be adequately staffed to address the payment demands of their service suppliers.

To deal with the burden of collecting from resellers, APCC Services, APCC's compensation clearinghouse, had to dedicate one full-time staff member solely to researching resellers, with other staff members helping as time permitted, attempting to identify resellers with high call volumes, determining how to contact them, and making repeated phone calls seeking to cajole or threaten them into making payments. *Id.*, ¶ 14. Even so, few if any collections would have been made if APCC Services had not resorted to extensive use of litigation to support its collection efforts. *Id.*, ¶¶ 15-16.

Frequently, the resellers from whom APCC Services sought to collect were no longer in business, claimed they were not "switched-based" resellers, or simply ignored APCC Services' request for payment. Collection was further complicated by the fact that relatively few resellers even had bothered to track calls originating from payphones. And even successfully collecting back compensation from a particular reseller did not guarantee that the reseller would continue to pay in the future. Many agreed to payment plans but subsequently stopped paying due to bankruptcy or other reasons.

One example highlights the futility of so many efforts by PSPs to collect compensation owed by switch-based resellers. In 1999, APCC Services began a long pursuit of a reseller owned by two individuals. The reseller finally admitted an

obligation and began making payments. Subsequently, the reseller went into bankruptcy and stopped its payments. To make matters worse, the trustees in bankruptcy sued APCC Services to recover the reseller prior payments. Meanwhile, adding insult to injury, the same two individuals that had owned the now-bankrupt entity re-emerged with a company offering prepaid card services. This company also failed to meet its obligations. APCC Services then brought suit against the new company, but ultimately concluded that further litigation was not worth the cost. Jaeger Dec., ¶¶ 20-21.

3. Disproportion of Costs Incurred to Revenues Collected

Not only was it very difficult and expensive to collect from resellers, but the payoff was usually small in comparison with the costs incurred. APCC Services and its allied aggregators and PSPs have initiated 66 proceedings⁵ at the FCC or in federal courts against switch-based resellers who owed per-call compensation to PSPs – a small fraction of the probable number of nonpaying carriers. Even today, one-and-a-half years after the “old rule” expired, PSPs continue to pursue collection proceedings against 16 resellers for compensation owed during the 1997-2001 period. *Id.*, ¶¶ 16. Yet, the payoffs from these efforts have frequently failed to justify the costs. In the 1999-2001 period, out of every \$100 collected by APCC Services, facilities-based carriers⁶ accounted for about \$93.50, while switched-based resellers paid about \$6.50, an average

⁵ This does not include actions initiated by the Bell Operating Company PSPs and many actions initiated by other PSPs not represented by APCC Services, nor does it include settlements reached prior to bringing an action.

⁶ The following five carriers have consistently made the largest individual compensation payments: AT&T, MCI/WorldCom, Sprint, Qwest, and Global Crossing.

in the neighborhood of ten cents per reseller, or 0.1% of the total dial-around payment. Jaeger Dec., ¶ 17. Hundreds of other resellers were *not* pursued by APCC Services because the costs of prosecuting them individually clearly exceeded the likely recovery.

The dispersal of compensation obligations among hundreds of switch-based resellers, most of whom were individually too small to be economical targets of PSPs' collection efforts, *guaranteed* that a large percentage of the total compensation owed would fall through the cracks of the compensation system (Jaeger Dec., ¶¶ 18-19), thereby *ensuring* that PSPs would be *uncompensated* for "each and every . . . call" (47 U.S.C. § 276(b)(1)(A)) routed to those resellers. This, in turn, had a substantial negative impact on the federal mandate to "promote widespread deployment of payphone service." *Id.*

C. IXCs Are Better Situated to Collect Compensation from Resellers

By contrast with the old rule, the current rule appropriately relieves PSPs from the inordinate burden of collecting compensation from resellers, and places compensation responsibility on the party best situated to handle it – the facilities-based IXC. The facilities-based IXCs are not uninvolved bystanders – they are full-fledged participants in the compensation system (indeed, the most important participants, since they must track payphone calls as well as pay compensation). Whether or not they are required to pay compensation for resellers, the facilities-based IXCs must maintain extensive systems for tracking and paying for compensable calls, and for recovering the costs of those calls by applying payphone surcharges to customers. The costs incurred by facilities-based IXCs to include resellers in these systems cannot match the costs incurred by PSPs for three simple reasons.

1. Placing the Payment Obligation on the First Facilities-Based IXCs Greatly Reduces the Number of Transactions Involved in the Dial-Around Process

First, the number of IXCs that must collect compensation from resellers is far less and far more concentrated than the number of PSPs that must do so. Over 90% of compensation is currently paid by five or six carriers. Further, only about 30-35 IXCs currently pay compensation to APCC Services clients. By contrast, the top five PSPs account for a much smaller percentage of the payphone industry, and the number of PSPs collecting compensation exceeds 2,000.

Under the current rule virtually all of the compensation that was owed by switch-based resellers under the old rule is owed by the five major facilities-based IXCs (MCI WorldCom, Sprint, Global Crossing and Qwest) that serve the bulk of the resellers. Collecting this compensation requires “only” 10,000 transactions – a process that is still very complex and potentially costly as there are 10,000 subjects of potential payment disputes – until it is compared to the complexity and transaction costs associated with the old rule. But if the old rule were reinstated, even if there are only 200 switch-based resellers – and there may be more – that would owe compensation, the rule would add 400,000 transactions to the number of transactions that must take place for PSPs to be paid their compensation. This means there would be not 10,000, but 400,000 potential payment disputes to be resolved every quarter.

2. IXCs Have Leverage Over Their Reseller Customers

Second, unlike PSPs, IXCs have existing contractual service relationships with the resellers from whom they collect compensation. This gives IXCs leverage over resellers that PSPs entirely lack. If resellers do not pay their bills, the IXC is not required to continue serving the PSP. If resellers are found to be bad credit risks, the

IXC can protect itself by *e.g.*, requiring surety bonds or deposits. As the FCC put it in its brief to the court of appeals in Sprint:

[B]ecause the IXC provides the input central to the SBR's entire business, the IXC holds considerable leverage over the SBR that the PSP lacks entirely. By making the IXC initially responsible for payment to the PSP, the FCC [gives] the IXC a strong incentive to use its leverage to derive all of the necessary call data from the SBR. That same leverage enables the IXC to obtain reimbursement from the SBR. Under that arrangement, the PSP will be fully compensated in a way that fulfills the Commission's policy that the primary economic beneficiary of the call bears its cost.

* * *

It makes no difference that the IXC itself cannot directly track an SBR call, because the IXC can require the SBR to provide the requisite data (in the requisite format) as a condition of service contained in the resale contract."

* * *

[T]he customer relationship between the IXC and the SBR supplies the very incentive to cooperate that was missing from the original rule. . . . under the old rules, PSPs often received no data at all and had no power to negotiate any other arrangement, whereas now IXCs can insist as a condition of service that SBRs provide not only complete data but also any necessary indicators of its reliability [and a] verification system, such as a periodic audit."

FCC Br. at 27, 28-29, 30. Moreover, due to the IXC's leverage, the IXC's reseller customers have personnel whose job it is to address payment demands of the service supplier. Resellers are equipped to respond efficiently to IXC demands for payment – which few if any were equipped to do in the case of the PSPs.

3. IXCs Have Far More Information About These Resellers

Third, IXCs have far more information about their reseller customers than do PSPs. As the FCC correctly found in the *Second Reconsideration Order*, 'the first underlying interexchange carrier is reasonably certain to have access to the information necessary for per call tracking or to be able to arrange for per call tracking in its

arrangements with switch-based resellers that complete the calls.” *Second Order on Reconsideration*, ¶16. IXC’s are not dependent on others to identify the resellers who owe them compensation. IXC’s already know exactly who their reseller customers are, and therefore know to whom to send the compensation bill for any given call. Because they bill their customers monthly, they know much sooner when a customer is in financial distress, and are thus better positioned to protect themselves against bankruptcies and bad debt. Furthermore, because resellers are their customers, IXC’s billing systems must collect information about resellers use of IXC’s networks as part of their normal billing mechanism. It is obviously much easier for IXC’s to utilize their existing systems to generate information about resellers than for PSPs – who have no business relationship with resellers – to generate such information from external sources.⁷

4. In Any Event IXC’s Have the Ability to Relieve Any Burdens by Moving to a Market-Based System

In any event, IXC’s should not be heard to complaint about the burdens of paying compensation for reseller calls. Unlike PSPs, the IXC’s have it in their power to relieve themselves of any such burden, and any other administrative burden attributable to payment of FCC-prescribed compensation. As the FCC noted more than four years ago in the *Third Payphone Order*,⁸ “IXC’s currently possess the technology and receive the

⁷ Moreover, in any event the IXC’s must maintain tracking and billing systems that generate a pool of data on compensable payphone calls and apply payphone surcharges to all their customers who are end users or switchless resellers.

⁸ *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Third Report and Order, and Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 2545 (1999) (“*Third Payphone Order*”), *aff’d sub nom. Amer. Pub. Comms. Council v. FCC*, 215 F.3d 51 (D.C. Cir. 2000).

coding digits necessary to implement a targeted call blocking mechanism,” whereby IXC’s could selectively block calls where the compensation requested by a PSP exceeds what the IXC or its customer are willing to pay. *Id.*, ¶ 16. With the deployment of targeted call blocking, the Commission found it should be feasible to move to a market-based compensation system in which the compensation rate (and the identity of the payer) could be negotiated among PSPs and IXC’s. The IXC’s have not deployed selective call blocking to date. Apparently, they have not even moved to develop such blocking capability. Accordingly, the IXC’s should not be heard to complain about any administrative burdens of the current regulated compensation system.

For all these reasons, the current rule is a logical and appropriate means of allocating compensation responsibility fairly and efficiently to the parties best situated to implement compensation payments.

D. Available Data Indicate That the Current Rule Is Substantially Improving PSPs’ Collection of Compensation for Switch-Based Reseller Calls

There can be little question that the amendments made in the *Second Reconsideration Order* have improved overall collections of dial-around compensation for the payphone industry. Although it is not easy to isolate changes due to the *Second Reconsideration Order* from other compensation trends, APCC Services has estimated, based on reasonable and conservative extrapolations from solid data, that compensation paid by first-switch IXC’s for switch-based reseller calls for the immediate post-November 2001 period has averaged at least 50% higher than the compensation paid by switch-based resellers during the prior two years. *See* Jaeger Dec., ¶¶ 31-33.

Moreover, where IXC’s have quantified the volume of calls routed to resellers in the pre-November 2001 period, those acknowledged call volumes -- which provide an

indication of the amount the IXC would have paid directly for the same calls – greatly exceed the amounts that PSPs have been able to collect from the same group of switch-based resellers. For example, in the course of a lawsuit brought by APCC Services and its allied aggregators and PSPs against Cable & Wireless, Cable & Wireless claimed that a large volume of calls was not its responsibility and identified seven of its reseller customers who had assumed responsibility to pay for the calls routed to them by Cable & Wireless. Even with the aid of the contact information, evidence of contracts assuming responsibility, and calling data provided by Cable & Wireless, however, APCC Services was able to collect for a small fraction of the calls that Cable & Wireless said were routed to the resellers. Clearly, APCC Services can collect a much larger percentage of Cable & Wireless’s calls under the current rule requiring Cable & Wireless to pay directly for the calls.

Another indication of the difference between the current rule and the old rule is provided by data that Global Crossing has made available to PSPs. APCC Services received compensation payments from only a portion of the resellers named by Global Crossing. Based on very conservative (and unrealistic) assumptions, APCC Services compared the number of calls that Global Crossing’s resellers paid for prior to November 2001 with the number of calls that Global Crossing attributed to switch-based resellers. We determined that, in the eight quarters prior to November 2001, a *minimum* of 55.9% of the switch-based reseller calls that originated from payphones and were carried on Global Crossing’s network went unpaid. *See* Jaeger Dec., ¶ 34 and Attachment C. Based on this analysis, it is reasonable to expect that Global Crossing and other carriers will pay for more than twice as many switch-based reseller calls post-November 2001 than the resellers themselves paid for prior to November 2001.

Equally important, the cost of collections has declined dramatically. PSPs no longer need to deal with resellers – and thereby are saving the very substantial cost of collection activity and litigation against resellers. Jaeger Dec., ¶ 30. Overall, the efficiency of collection has clearly improved. In areas where the LEC makes available CIC records, which have a close correlation with the first-switch carrier, it is far easier now for PSPs to assess the accuracy of payments for switch-based reseller calls, and to support their challenges to disputed payments. As a result, a PSP that spent countless hours pursuing collections from switch-based resellers prior to the current rules, without which his collection rate was about 60%, estimates that he has increased his collection rate to 98% while expending a fraction of the time. Cooper Dec., ¶¶ 6, 9-11.

E. Carriers, Resellers, and PSPs Have Adjusted to the Current Rule

The current rule, which places responsibility for reseller calls on the first facilities-based IXC, has been in effect for nineteen months. The parties have now had four complete payment cycles' worth of experience under the current rule. The major IXCs have had time to modify their tracking and payment systems to comply with the current rule, and to implement whatever contract modifications were necessary to recover their compensation payments from resellers. As for the resellers, those who were actually paying compensation under the old rule have adjusted their systems to reflect the fact that they are no longer required to pay PSPs directly. PSPs have also adjusted their compensation collection systems to reflect the fact that they need no longer chase resellers, and have concentrated on developing mechanisms for auditing facilities-based carriers. If the Commission were to decide to alter the payment rules once again and return responsibility to switch-based resellers, all these adjustments would have to be reversed. IXCs would need to reprogram their systems to exclude

calls from resellers from the pool of “compensable calls.” Resellers would need to reactivate or reconstruct their payment systems, and PSPs would need to reinstitute their programs for identifying, dunning, and suing uncooperative resellers.

All of these changes would generate major costs and confusion – particularly for small companies like independent PSPs and resellers. Without a compelling reason, the Commission should not subject the payphone and long distance industries to yet another painful transition.

II. CLEARINGHOUSES

In the *Second Order on Reconsideration*, the Commission seeks comment on whether parties have entered into “clearinghouse arrangements to track coinless calls,” and “whether such arrangements have resulted in satisfactory compensation mechanisms for PSPs.” *FNPRM*, ¶ 26. In fact, as the Declaration of Ruth Jaeger explains, clearinghouses have very limited if any ability to improve *tracking* of calls. While clearinghouses play an important role in the DAC process, they do nothing to ensure that either the tracking process or the call counts given to PSPs is accurate. As explained below, they are entirely dependent on data provided by other sources, and they have only a limited role in ensuring the accuracy of the data they are given. For this reason, clearinghouses cannot be relied upon to ensure the integrity of the dial-around compensation process; their main role is to effectuate an efficient payment mechanism, not to ensure the accuracy of the payments or the underlying information upon which the payments are based.

Of equal or greater significance the existence of clearinghouses does not in any manner affect the ability or willingness of carriers, and in particular SBRs, to meet or fail to meet their DAC responsibilities. If a carrier is not visible to PSPs and would not

otherwise be targeted for DAC collection, the presence of a clearinghouse does nothing to affect whether the SBR pays compensation.

A more extensive description of the rate of clearinghouses appears in the Jaeger Declaration. We observe here that clearinghouses exist on both the PSP side and the IXC side. APCC Services follows a process that is more or less typical of PSP clearinghouses – or “billing aggregators,” as they are known in the industry. During each billing cycle, APCC Services receives from each of its PSP customers a list of ANIs eligible for payment under the Commission’s rules. In general, although APCC Services does some quality control, APCC Services does not validate whether the lists are accurate, and cannot validate whether the ANIs in the lists meet the Commission’s criteria for eligibility for payment. The individual PSP lists are combined and aggregated into a single list and put into a format that will be processed by and is compatible with the processing capabilities of the IXC clearinghouses and individual carriers. The CDs containing the lists are then sent to hundreds of carriers,⁹ including the IXC clearinghouses.

Once payment is received by the PSP clearinghouse, the accompanying data is disaggregated and broken out into reports for individual PSPs. The PSP’s report shows the payment received for each of that PSP’s ANIs along with the ANI specific detail information required by the Commission’s rules, assuming it has been sent by the IXC or the IXC clearinghouse. The report may also contain other information, but APCC

⁹ The PSPs have no way of knowing which of the carriers may be first facilities based carriers in some markets and which are pure facilities based resellers. The only way to attempt to capture all the DAC that is due is to send the bills to all the carriers that the APCCS can identify.

Services, as the billing aggregator for the PSPs, is dependent on the data received from the carriers or their clearinghouses.

On the carrier side, the clearinghouse process is similarly dependent on data received from other sources. The IXC and their payment clearinghouses begin with the ANI lists submitted by the PSP or the PSP billing aggregator. That list is compared with LEC ANI lists, which are lists of payphone ANIs in service and presumably eligible for payment that the IXC or its payment clearinghouse receives from the various LECs. While the lists are compared to validate that the ANIs submitted by the PSPs match with an ANI on a LEC ANI list, the IXC payment clearinghouse does not independently check either list. Thus, if there is an ANI on the PSP list that does not have a counterpart on the LEC ANI list, the IXC payment clearinghouse simply does not pay DAC on the “disputed” ANI; there is no effort made by the IXC clearinghouse to find the source of the mismatch. It is left to the PSP to attempt to get the problem corrected in time to try to get payment for the ANI in a later payment cycle. Similarly, if there is an ANI on the LEC list for which no PSP seeks payment, the IXC clearinghouse makes no effort to ascertain which PSP should be paid for that ANI.

Once the IXC’s payment clearinghouse has a list of ANIs for which the IXC intends to pay, the list of ANIs must in some manner be matched up against the calls contained in each IXC’s records for each of the ANIs. This process also is entirely dependent on the data and call tracking records generated by the IXCs, for which the clearinghouse has no responsibility and for which the clearinghouse does no independent validation.

Once the number of calls for each ANI has been ascertained, the IXC payment clearinghouse produces a report for each ANI for each of its carrier customers. Those

reports are then translated into payment due each ANI and aggregated up to the payment due each PSP and in turn the various PSP aggregators. At the appropriate point in time in the billing cycle, the money necessary to pay the PSPs and the aggregators will be transferred between the IXC and its payment clearinghouse and transmitted on to the PSPs and the PSP billing aggregators.

From this description, a couple of points are clear. The IXC payment clearinghouses are dependent on the data submitted by the IXCs. The involvement of a clearinghouse does nothing to enhance the integrity of the data or the call tracking process of the carriers involved.

Of equal or greater importance, the utility of clearinghouses is dependent entirely on the willingness of carriers to come forward and use the services of the clearinghouse. The existence of a Clearinghouse merely makes the payment clearing mechanism more efficient for the carriers, such as IXCs, who are willing to participate or who cannot, because of their visibility, avoid participating in the DAC scheme. If the underlying DAC regimen does not require or motivate the participation of the IXC, the presence of clearinghouses will not help. The clearinghouses were present under the Old Rule, and SBRs who were willing to meet their DAC responsibilities could have used them. But most did not because the DAC regimen neither motivated or required them to use the clearinghouses. Accordingly, the Commission should not look to clearinghouses to resolve the core problems that existed under the Old Rule or that would exist if first facilities based IXCs are relieved of their responsibilities to pay DAC for calls routed to switch-based resellers.

III. THE REPORTING REQUIREMENTS SHOULD BE STRENGTHENED

The compensation rule currently requires that:

The first facilities-based interexchange carrier to which a compensable coinless payphone call is delivered by the local exchange carrier must . . . send back to each payphone service provider at the time dial around compensation is due to be paid a statement in computer readable format indicating the toll-free and access code numbers that the LEC has delivered to the carrier, and the volume of calls for each toll-free and access number each carrier has received from each of that payphone service provider's payphones, unless the payphone service provider agrees to other arrangements.

47 CFR § 64.1310(a). The record amply supports the need for a rule no weaker than this. There must be a meaningful "audit trail" that enables PSPs to review the accuracy of IXC payments. While the current rule goes far toward providing an adequate audit trail, certain significant deficiencies remain and should be corrected.

As the Commission has found, all parties involved in a dial-around call are able to obtain call detail *except* the payphone service provider ("PSP"). *Second Reconsideration Order*, ¶ 12. During the prior proceedings at the FCC, APCC explained this information deficit in an ex parte submission:

The PSP will have no way of knowing whether [a] particular call was paid for, nor if it was, by which IXC of the 1300 or so IXCs that are billed. The PSP is not provided by any IXC with a list of calls the IXC is paying for. Thus, the PSP cannot compare the SMDR/CDR to a list of calls for which the PSP has been paid to know either the short falls in payment or which calls need to be pursued for collection.

"Narrative to Accompany 'Call and Dollar Flow in Dial Around Calls from Payphones'" at 5-6 ("APCC Narrative"), attached to Letter from Robert F. Aldrich to Magalie Roman Salas, dated November 15, 2000.

Obtaining detailed information from carriers about compensable calls is especially critical when calls are routed to resellers, and payment is based on whether the call is completed to the reseller's customer. Although required by Commission orders to provide certain information, IXC's generally have provided as little information as possible about their reseller customers, claiming confidentiality concerns and other excuses.¹⁰ While the Commission's assignment of payment responsibility for these types of calls to the first facilities-based IXC greatly alleviates the problem of identifying the responsible payer, there remains great potential for abuse in the reseller's provision of information to the first facilities-based IXC about the completion of calls. The virtually uniform experience of PSPs with resellers under the compensation system is that most resellers cannot be relied upon to accurately track completed calls without supervision. Therefore, it remains critical to ensure provision to PSPs of complete information about the volumes of calls routed to resellers.

But call volume information is also very important when the call involves only a facilities-based IXC. As explained above in the quotation from APCC's November, 2000 submission, the PSP's ability to effectively audit or review the payments it receives from

¹⁰ APCC Services has had a long-running dispute with several IXC's over obtaining sufficient information to enable PSPs to identify calls handled by switch-based resellers. Initially, intervention by the FCC's Enforcement Bureau was required in order to get the first carrier to provide APCC Services a simple list of reseller names. By the time the data was received, it was many quarters old and delivered with no contact information or call volumes.

After finally receiving, in the context of separate litigation, from certain IXC's lists of their alleged switch-based reseller customers, APCC Services found that many companies on those lists denied that they were switch-based resellers. In other cases, APCC found that the switch-based reseller claimed they paid payphone surcharges to the IXC and the IXC had failed to remit the payments to the PSPs.

carriers is inherently very limited. Even when the PSP has call detail records available to it, those records provide only the telephone numbers dialed. They do not identify the carrier handling the call (or, in the case of access code calls, whether calls are completed to the called party). These limitations exist whether or not the call involves a reseller.

In order to ensure that adequate information is available to PSPs to audit the compensation payments they receive from IXC's, the call reporting requirement should be amended in two respects.

First, IXC's must provide reseller names and addresses for each toll-free number belonging to a reseller. Under the "old rule," IXC's were required to identify the resellers to whom they route calls. Under the current rule, this information is not explicitly required, and IXC's generally have not provided it. The IXC's are required to identify the toll-free numbers to which calls are routed, and to provide the number of calls completed to each number from each payphone, but they are not expressly required to match toll-free numbers to the names and addresses of their reseller customers. Reseller identities, however, continue to be critical information. While payment responsibility has been shifted to the facilities-based carrier, the carrier is still dependent on the reseller to identify the number of completed calls. PSPs need to know which resellers are associated with which toll-free numbers, so that they can identify resellers who may be underreporting completed calls.

Second, the current rule does not require IXC's to provide any detail on call attempts – only completed calls. *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Third Order on Reconsideration and Order on Clarification*, 16 FCC Rcd 20922, 20925, ¶ 9 (2001) ("Third

Order on Reconsideration"). As a result, unless PSPs are able to maintain their own call records or to obtain call records from the LEC, they are not able to assess the accuracy of the IXC's call counts. This is, again, particularly important for reseller calls, for which the IXC is relying on information from its resellers concerning call completion. If the PSP has information on all call attempts routed to the reseller's platform, as well as completed calls, the PSP can determine the reseller's reported call completion ratio, and use that information to identify those resellers whose call completion reports require further investigation. Without such information, the PSP has no basis for assessing which resellers are reporting suspiciously low completion ratios.

The burden of complying with existing requirements and these relatively minor modifications will not be great. Carriers have already had to make the necessary investment in the data systems necessary to comply with the current reporting requirements. Moreover, the bulk of the information that IXCs would have to provide is the very information that carriers must collect in order to accurately compensate PSPs.

IV. THE COMMISSION SHOULD ALLOW IXCs TO CHOOSE TO ADOPT PROXIES FOR COMPLETED CALLS DELIVERED TO SBRs

In the *Third Order on Reconsideration*, the Commission ruled that facilities-based interexchange carriers ("IXCs") may not elect to treat calls that are handed off to switch-based resellers as "completed calls" for compensation purposes. 16 FCC Rcd at 20924-25, ¶¶ 7, 8. The Commission was concerned that such a practice might result in overcompensation to PSPs. *Id.*

The Commission did not explicitly address whether an IXC may use a reasonable proxy for completed calls, but has now asked for comment on that issue. *FNPRM* at

¶ 20. At present, IXC's must rely on call completion information from resellers. The IXC's claim it is burdensome to gather this data and that it complicates their relationship with their reseller customers. Further, the accuracy of the information is difficult to verify, leading to general concerns about its reliability and whether it is leaving the IXC's with exposure.

The Commission can ameliorate these concerns by allowing an IXC to establish proxies, based on *its own* actual call completion percentages, that enable the IXC to pay PSPs for a percentage of the calls terminated to reseller switches. Such a practice need not create any risk that PSPs will be overcompensated, or that SBRs will be disadvantaged.

The major concern raised by SBRs, and prepaid card providers in particular, in earlier phases of this proceeding was that a single percentage completion rate would not reflect the many geographic sub-markets served by prepaid providers. There could be major differences in completion ratios, for example, between industrialized, technologically advanced markets, such as Japan or Western Europe, and other areas, such as parts of the middle east or Eastern Europe.

But the major IXC's also have experience in these sub-markets. Indeed, since it is the facilities of the major IXC's that are used by many SBRs to terminate traffic to the LECs in these areas, there is every reason to believe the completion ratio for major IXC's in virtually every sub-market will match that of SBRs.¹¹

Rather than relying on a single completion percentage for all markets, the IXC's could use completion percentages adjusted to reflect differing service areas and the

¹¹ In many instances, the major IXC's are marketing prepaid cards targeted to these same sub-markets.

corresponding completion percentages for calls on the IXC's own network. Call completion percentages can be matched up to the service areas that particular switch-based resellers target. Thus, PSPs will be compensated at a specific ratio for a reseller offering services similar to the IXC's own service.¹² For example, if a particular switch-based reseller offers debit cards targeted to a specific market in Asia, then an IXC may compensate PSPs for that particular reseller based on a proxy computed from its own call completion averages to a similar or sufficiently close service area in Asia.¹³

Other alternatives also suggest themselves. For example, the Commission could use a straight timing parameter. Once forty five (45) seconds after answer supervision from the SBR switch has elapsed, the IXC should be allowed to treat a call as complete. Calls exceeding a certain length, say 15 minutes, could be treated as 2 calls, with each 15 minute increment treated as another call. This would account for new calls completed through "# redial" and other conventions for making additional long-distance calls without initiating a new call at the payphone. The IXCs have to measure the length of the connect time in any event for their own billing purposes.

By following these alternative approaches, IXCs and SBRs can avoid incurring the expense of obtaining detailed call completion information from the resellers, and at the same time eliminate a major source of compensation disputes. Allowing IXCs to establish proxies based on actual call completion percentages or other reasonable proxies, will permit a substantially simplified compensation system, with reduced costs

¹² The completion percentages could be periodically adjusted.

¹³ While there would still need to be some exchange of information between the IXC and the SBR, the level of detail and the need for particular calls to be analyzed would be obviated.

for all. In addition, allowing IXC's to take this approach will increase the likelihood that PSPs can be compensated for "each and every" completed call.

A. Allowing an IXC to Adopt Proxy Measures is Consistent With Section 276 and Commission Policies

There is a critical difference between a rule that would *require* IXC's to pay compensation for all calls that are terminated to reseller switches, or require IXC's to establish proxies based on actual call completion ratios, and a rule which *allows* an IXC to *elect* to pay compensation for such calls as the IXC's way of fulfilling its payphone compensation obligations. This Commission has declared the long distance market to be competitive and has accordingly deregulated the IXC's as to their charges and practices vis-à-vis resellers. *Policy and Rules Concerning the Interstate Interexchange Marketplace, Second Report and Order*, 11 FCC Rcd 20,730 (1996). The relationships between IXC's and resellers are governed today by contract, not tariff. Resellers have the ability to shop in the marketplace for a different IXC if dissatisfied with the charges and practices of its current suppliers.

The Commission should carry this pro-competitive, pro-market approach into its implementation of the DAC regimen between parties who voluntarily enter into business relationships, as do IXC's and SBRs. Such an approach allows IXC's, who have the payment obligation under the Commission's rules, the flexibility to choose how to satisfy that obligation within reasonable parameters. The Commission should not unnecessarily interfere with IXC's' market decisions in this regard. As to the effect on the IXC's' customers, such as switch-based resellers, under the Commission's deregulatory policy for the long distance market, the relationships between resellers and their underlying carriers are treated as a private matter. If the approach adopted by a particular IXC is not cost-effective for an IXC's customers, it is likely that another

IXC will offer a different approach. The Commission need not mandate this approach, but only declare that it is an option that IXCs may legitimately choose.

Indeed allowing IXCs to adopt reasonable proxies, such as those suggested here, without mandating them can address the main danger the Commission perceived in rejecting the IXCs request that they be allowed to treat all calls handed off to an SBR switch as complete. In the *Third Order on Reconsideration*, the FCC determined that allowing IXCs to define a completed call as a call that is handed off to a SBR, “is inconsistent with Section 276 of the Act, which requires the Commission to ensure that PSPs are ‘fairly compensated for each and every *completed* intrastate and interstate call using their payphones.’” *Id.*, 16 FCC Rcd at 20924, ¶ 7. The Commission was concerned that PSPs might be compensated for incomplete calls, leading to overcharges for SBRs. But if an IXC adopts a proxy that overcompensates PSPs, that IXC, as discussed above, will lose its SBR customers to IXCs with a more reasonable proxy or IXCs that use the procedures available under the current rule.

Section 276 requires the Commission, in order to “promote payphone competition and the widespread deployment of payphones” (*id.*, § 276(b)), to “ensure that payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone” (*id.*, § 276(b)(1)(A)). By this provision, Congress established PSPs’ right to be fairly compensated for completed calls, but it gave the FCC latitude in defining how, and by whom, such compensation is paid. Nothing in this provision prohibits the Commission from adopting a rule that promotes an efficient compensation scheme by allowing IXCs limited flexibility in

identifying completed calls for purposes of payphone compensation.¹⁴ Indeed, the entire focus of Section 276 is on ensuring that PSPs obtain *enough* compensation to promote payphone competition and deployment. Permitting IXC's to compensate PSPs for calls delivered to reseller switches or allowing the IXC's to establish reasonable proxies based on their own comparable actual call completion ratios or reasonable timing parameters would not undermine either of these Congressional objectives.

B. The Commission has Authority to Permit IXC's to Use Reasonable Proxies and it is Consistent With Commission Policy and Precedent for the Commission to do so

While the Commission rejected treating every call handed off to an SBR as a completed call, the Commission plainly did not say that there has to be compensation for the exact number of calls completed. As the Commission pointed out in its brief to the United States Court of Appeals in Sprint,

The Commission has adopted no standard of exactitude. It has certainly placed upon the IXC the duty to make an effort to obtain completion data. But the Commission has not addressed the matter beyond that, and we would expect that, should it be called on to address a particular situation, the Commission would endorse reasonable practices by IXC's in furtherance of the per-call compensation requirements even if the ultimate numbers were not exact.⁷ Any such practice would be a great improvement over the existing regime of systematic undercompensation.

⁷ Indeed, one group of SBRs suggested in its comments that "[u]nless the switch-based reseller cooperates in providing

¹⁴ The Commission's rules allow for comparable flexibility for IXC's and PSPs to determine the terms of compensation by contract. 47 CFR § 64.1300(a). The contractual compensation arrangements between an IXC and PSP could provide for payments for all calls for which the IXC receives answer supervision, or for a percentage of calls dialed to be compensated, or for a timing parameter. The rule discussed in the text merely allows IXC's to elect, on their own, the same payment approach that they may currently adopt pursuant to an agreement with the PSP.

call completion reports, it will be in no position to criticize the facilities-based IXC for paying the PSP for both completed and uncompleted calls and passing on that charge.” Comments of CommuniGroup of K.C., In., et al. at 13 (JA ___).

Brief of the FCC, *Sprint v. FCC*, No. 01-1266, et. al (D.C. Cir.).

In recognizing its discretion to adopt reasonable practices, the Commission recognized that it could adopt proxies. Proxies that are rationally and reasonably related to the measure for which they are a proxy have been upheld by the courts. *E.g.*, *WorldCom et al. v. FCC*, 238 F. 3d 449 (D.C. Cir 2001) (FCC could rely on collocations as a proxy even though it is an admittedly imperfect measure of competition). Ease of administration is also a valid concern, *Id.*, as is the ease of collecting data. *Id.* *Cf.* *NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir 1984), (where the court repeatedly recognized the need for the agency to be free to exercise its discretion to impose reasonable proxies and surrogates where there was data lacking or it was difficult to come by. *Id.* at 1138 (surrogate surcharge on LEC private telecom systems upheld), 1139 (upholding “leaky PBX” surcharge in absence of data); 1146 (upholding local business line rate as surrogate on foreign exchange usage)).

In sum, it is consistent with the statute, Commission policy, the current regulations, and precedent for the Commission to allow IXCs to adopt reasonable surrogates for completed calls as an alternative to compliance with the Commission rules governing relations between IXCs and SBR.

V. THE COMMISSION SHOULD UTILIZE THIS OPPORTUNITY TO EXPLAIN THE APPLICATION OF ITS RULES TO LECs THAT CARRY COMPENSABLE CALLS

In order to alleviate any confusion about the meaning of the rule, APCC recommends that the Commission provide an appropriate clarification of the application of the rule to local exchange carriers (“LECs”).

In the *First Payphone Order*, the Commission made clear that LECs who carried otherwise compensable calls were required to pay compensation in the same manner as an IXC. *First Payphone Order*, ¶ 341. Nothing in the Commission’s *Second Reconsideration Order* indicates the Commission had any intent to reconsider that determination.¹⁵ Nevertheless, there is potential for confusion to arise from the use of the words “first facilities based interexchange carrier to which a completed coinless access code or subscriber toll-free payphone call is delivered by the local exchange carrier”. Therefore, APCC suggests that the Commission amend its rule by replacing the words “the LEC” with “a LEC” in the text of Sections 64.1300(a) and 64.1310(a), and by including the following “note”:

NOTE: If a LEC that originates an access code or subscriber 800 call made using a payphone (or that has such a call delivered to it by an originating LEC) completes that call to an end user, or terminates the call to (and receives answer supervision from) a subscriber to a toll-free service, then that LEC is considered to be the “first facilities-based IXC” and is required to pay compensation to the PSP for completed calls as described in this Subpart.

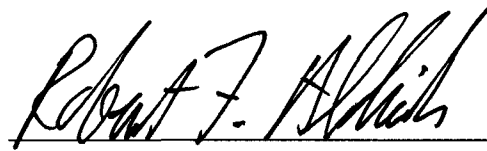
¹⁵ Any other result, of course, would be a clear violation of Section 276, which requires the Commission to ensure that PSPs are compensated for “each and every” completed call using their payphones.

CONCLUSION

In accordance with the foregoing comments, the Commission should readopt, with the modifications discussed above, the compensation rule currently in effect.

Dated: June 23, 2003

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert F. Aldrich", written over a horizontal line.

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